Supreme Court, U.S.
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No. 99——

# IN THE
# Supreme Court of the United States

ABRAHAM D. SOFAER,
*Petitioner,*

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, consistent with principles of due process, a State Bar may subject an attorney to disciplinary sanctions—under a vague, general standard—for conduct that, at most, creates an appearance of impropriety.

2. Whether, consistent with principles of due process, a State Bar may reformulate the particular disciplinary charges against an attorney after a hearing on the initial charges has concluded.

## PARTIES TO THE PROCEEDING

The parties to the proceeding are Abraham D. Sofaer; the District of Columbia Court of Appeals; the District of Columbia Court of Appeals Board on Professional Responsibility; the District of Columbia Court of Appeals Board on Professional Responsibility Hearing Committee Number One; and the Office of Bar Counsel.

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## PETITION FOR A WRIT OF CERTIORARI

Abraham D. Sofaer respectfully requests that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals in this case.

## OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a) is reported at 728 A.2d 625. The Order of the Board on Professional Responsibility (Pet. App. 10a) and the Report and Recommendation of Hearing Committee Number One (Pet. App. 71a) are unreported.

## JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 22, 1999. A timely petition for rehearing was denied on October 8, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution reads in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Rule 1.11(a) of the District of Columbia Rules of Professional Conduct provides:

> "A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee."

## STATEMENT

This case raises two questions under the due process clause. The first is whether long-established "void for vagueness" principles prevent a State Bar from disciplining an attorney based on nothing more than the possibility that he "may have received information" during his government service that might be useful in a later representation. Pet. App. 5a. Applying that standard, the District of Columbia Board on Professional Responsibility imposed a disciplinary sanction on petitioner, even though no showing was made that petitioner had actually received any relevant useful information. The court of appeals, holding that "the actual receipt of . . . information . . . is immaterial," affirmed. Pet. App. 5a (internal quotation marks omitted).

The second question is whether a State Bar may retroactively redefine the charges against an attorney after a hearing on the initial charges has concluded. Here, Bar Counsel charged that, under the standard noted above, petitioner might have received useful confidential information during his work on three specific government matters. Following the hearing, however, the Hearing Committee (in its Report and Recommendation) formulated

a new definition of the matter on which petitioner was said to have worked. The sanction against petitioner was then imposed (and upheld) on the basis of his participation in that reformulated matter.

1. These issues arise out of a disciplinary case brought against petitioner for undertaking a limited representation of Libya in connection with the tragic bombing of Pan Am Flight 103 over Lockerbie, Scotland. The case was the first—and remains the only—disciplinary case ever filed under the so-called "revolving door" provision, Rule 1.11(a), of the District of Columbia Rules of Professional Responsibility.[1] As a background to the due process questions raised by the proceedings themselves, and by the sanction ultimately imposed upon petitioner, it is necessary to review briefly both the work that petitioner performed at the Department of State and the nature of the limited representation of Libya that petitioner later undertook.

**A. Work at the Department of State.** The bombing of Pan Am Flight 103 took place on December 21, 1988. At that time, petitioner was serving as Legal Adviser to the Department of State (R. 22, p. 190). Following the bombing, the Justice Department launched an investigation to determine responsibility for it. At all times, the Justice Department kept control of the investigation exclusively in the hands of the Federal Bureau of Investiga-

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[1] Rule 1.11(a) reads as follows:

> "A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee."

As we discuss, *see* pages 15-17 *infra*, the District of Columbia Court of Appeals, in construing the language of this rule, has held that two matters are "substantially related" whenever "it is reasonable to infer counsel *may have received* information during the first representation that might be useful in the second. . . ." Pet. App. 5a (internal quotation marks omitted) (emphasis added).

tion, which worked with Scotland Yard on the matter. Neither petitioner nor any other person in the Department of State worked on or participated in the criminal investigation (R. 22, p. 191; R. 44, pp. 63-65).

Although petitioner played no role in the investigation itself, he received, along with approximately 25 other senior State Department officials, a daily classified briefing paper, which occasionally included general information concerning the investigation (R. 22, p. 191). Those briefings made no mention of Libya as the perpetrator of the bombings. Indeed, during the time that petitioner was Legal Adviser, the Justice Department had not identified Libya as the likely culprit (R. 8, Ex. 40; R. 22, pp. 208-09). Two other countries were suspects (R. 22, p. 206), and petitioner was involved in a diplomatic exchange with one of these countries (R. 22, p. 192-93).

As the criminal investigation was going forward, the families of the victims filed wrongful death suits against Pan Am, which were consolidated into a single proceeding, *In re Air Disaster at Lockerbie, Scotland*, before the United States District Court for the Eastern District of New York (the Civil Case). Pan Am, as sole defendant in the Civil Case, served non-party subpoenas on six agencies of the United States government, including the State Department, seeking documents related to its theory that the government had received advance warnings of the bombing (R. 8, Exs. 1, 2, and 3). The government investigated the theory and concluded that it was false and without merit. Petitioner had no personal involvement in the investigation of the theory, but did learn that it was meritless (R. 22, pp. 201-02; R. 23, p. 12).

The Justice Department had primary responsibility for the response of all six agencies to the subpoenas. It instructed each of the subpoenaed agencies, including the State Department, to review its files for several purposes: to determine whether the files contained any documents

responsive to the subpoena; to recommend to the Justice Department how it wanted the Department to respond to its subpoena; and to name someone to serve as a possible witness in testifying about any documents to be produced (R. 8, Exs. 1, 2, and 3). Petitioner did not participate in any way in the search of State Department records for documents responsive to the subpoena (R. 22 pp. 195-96). On the basis of the search, however, a memorandum was prepared in the Office of Legal Adviser, recommending to the Director General what the State Department response should be. Because this memorandum was directed to a higher official in the Department, it was sent in the names of the Chief of the Office of Counter-Terrorism and of the Legal Adviser. Petitioner read this memorandum, approved its recommendations, and initialed his name on it for forwarding to the Director General.

Petitioner did not personally prepare the memorandum or have any involvement in the circumstances leading to its preparation. He learned nothing about the contents of the documents that the State Department had reviewed and found responsive to the subpoena (R. 22, pp. 193-96; R. 23, p. 13). His only role consisted of reading and approving the recommendation in the memorandum, which on its face declared the Pan Am theory to be meritless. The memorandum dealt entirely with procedural issues, rather than with the case itself or the evidence uncovered (R. 8, Ex. 40). The Justice Department later succeeded in having the subpoenas quashed because the evidence established that the theory advanced by Pan Am had nothing to do with the Civil Case.[2]

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[2] Petitioner testified that he was asked by the Chief of Counter-Terrorism whether the designated State Department witness for documents should be told about a meeting between the Secretary of State, the Chief Executive Officer of Pan Am, and the Chief of Counter-Terrorism in which the theory advanced by Pan Am was

**B. The Limited Agreement to Represent Libya.** Petitioner left the State Department in mid-June 1990, after five years of service, and joined the law firm of Hughes, Hubbard & Reed (the "law firm"). At the time that petitioner left the State Department, he was unaware of any involvement of Libya in the Pan Am Flight 103 bombing, or of any evidence that Libya or Libyans might have been responsible.[3] Petitioner later learned from public reports, published over a year after he joined the law firm, that the Justice Department had indicted two Libyan terrorists for the bombing of Pan Am Flight 103 and that the United States had accused Libya of responsibility for the bombing. Thereafter, he also learned that the United Nations Security Council had adopted Resolutions demanding that Libya compensate the families of the victims and comply with requests by the United States and United Kingdom to surrender custody of the indicted terrorists.

In late 1992 petitioner was approached by an American attorney and asked if he would be interested in representing Libya with regard to its problems concerning Pan Am Flight 103. The uncontradicted evidence is that, while petitioner refused to accept a representation that would defend Libya in any way, he expressed possible interest in assisting Libya to satisfy its obligations under the Security Council Resolutions. Libya was prepared to discuss representation by petitioner on this basis (R. 22, pp. 210-11). After discussions between petitioner and representatives of Libya, petitioner and his law firm conditionally agreed to represent Libya for the limited purposes of attempting two settlements: a mutually acceptable agreement between Libya and the families, under

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discussed. Petitioner replied he knew of no reason why the witness should not be told. The theory by then had been proved meritless.

[3] The successor to petitioner as Legal Adviser testified that he had no reason to doubt the statement that petitioner learned nothing about Libya's involvement until long after he had left the State Department (R. 23, p. 204).

which Libya would compensate the families, and a mutually acceptable agreement between the United States and Libya with regard to the extradition of the two terrorists and the forum to which they would be surrendered.[4] Petitioner thereafter applied for and obtained licenses from the Treasury Department to commence the representation.[5]

The representation proved short-lived. News of the proposed representation produced a firestorm of negative coverage from the media, as well as protest and anger from families of some of the victims, who objected to any settlement with Libya (R. 22, p. 231). In light of the public criticism—some of which focused on petitioner's former service at the State Department—petitioner wrote

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[4] Petitioner had considerable experience at the State Department in effectively mediating similar confrontations between governments and families of victims. For example, he had successfully performed this function in negotiations between Chile and the private estates and families of assassinated diplomat Orlando Letelier and U.S. national Ronnie Moffet, for whose killing Chile ultimately accepted responsibility, without admitting culpability (R. 22, pp. 150-62). He arranged a settlement on the same basis for compensation by Iraq of families of seamen who were killed or wounded when Iraq aircraft fired two missiles at the USS Stark (R. 22, pp. 183-84). He also successfully negotiated a settlement whereby Egypt paid six Israeli families and one American for the killing of seven civilians at Ras Burqa by a demented Egyptian border guard (R. 22, pp. 182-83).

[5] Petitioner could not legally begin to provide legal services for Libya until he satisfied the licensing requirements of the Office of Foreign Assets Control of the Department of the Treasury ("OFAC"). (Libya had been placed under United Nations sanctions, and the United States had prohibited financial transactions or performance of services between United States citizens and Libya without a license from OFAC (R. 22, p. 56)). The conditional agreement with Libya was expressly contingent both on meeting these requirements and on checking for conflicts of interest. While petitioner and his law firm actually began to seek information in publicly available records and documents, petitioner spent much of his time in efforts to negotiate with officials of OFAC concerning the correct license that petitioner needed (R. 22, p. 70 and pp. 222-29).

to the Legal Adviser of the State Department, requesting his position on the proposed limited representation of Libya, and stating he would withdraw from any representation if the State Department believed that his prior service in the Department raised an ethical problem (R. 8, Ex. 25). The Legal Adviser undertook to investigate the matter.

Criticism of the representation continued in the press, however, and petitioner and the law firm soon decided not to continue with it.[6] Petitioner and the law firm stated that the unfavorable media and public reaction precluded petitioner from effectively developing a consensual plan to pay compensation acceptable to the families and to surrender the indicted defendants in a manner acceptable to the United States (R. 8, Ex. 30). At that point petitioner and his firm had provided no advice or other services to Libya on any issue. After withdrawing, the law firm returned the fee that it had received from Libya pursuant to a special license granted by OFAC for that purpose (R. 23, p. 112).

2. Acting on press reports and without receiving a formal complaint, Bar Counsel then initiated a disciplinary case against petitioner. Relying on Rule 1.11(a), *see* note 1 *supra*, Bar Counsel later alleged, in a Specification of Charges, that petitioner, while at the Department of State, had participated in three specific "matters" that were "substantially related to" his limited representation of Libya: "the interests of the government of the United States in connection with (a) acts of Libyan terrorism directed against the United States citizens, (b) the [Civil Case], and/or (c) the Criminal Case."[7] Fol-

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[6] The decision was announced approximately two weeks after the beginning of efforts to obtain the OFAC license and to complete other requirements of the agreement with Libya.

[7] The first of these matters involved a decision by the United States government to bomb Tripoli in retaliation for certain ter-

lowing the close of evidence, however, the Hearing Committee reformulated the charges. Observing that "Bar Counsel does not delineate in consistent terms the precise formulation of the 'matter' or 'matters' in which [petitioner] participated personally and substantially as a government lawyer," Pet. App. 113a, the Hearing Committee advanced its own definition of the relevant matter. According to the Hearing Committee, petitioner had personally and substantially participated in "the establishment of culpability for the 1988 Pan Am 103 bombing, including the government's investigation and the ensuing litigation concerning the bombing." Pet. App. 113a.

The Hearing Committee then found that this newly defined "particular matter" was "substantially related" to the representation of Libya. Relying on a prior court of appeals' decision, *see Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (*en banc*), the Committee stated that the critical inquiry on this question was whether "it was reasonable to infer that the lawyer *may have received* useful information during the government representation. . . ." Pet. App. 109a (emphasis added); *see also* note 1 *supra*. If so, the Committee said, "there would be a conclusive inference that useful information was in fact received." Pet. App. 109a. The Committee emphasized that, following the dictates of *Brown*, it "would not require proof that an attorney actually had access to or received privileged information in the prior case." Pet. App. 109a. As a result, acting upon the possibility that petitioner might have received useful information, the Committee, by a divided

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**rorist acts by Libya. The Hearing Committee concluded that this matter—which took place in 1986, four years before the bombing of Pan Am Flight 103—was unrelated to the subsequent representation of Libya in connection with the Pan Am bombing. Pet. App. 113a-117a. It is no longer part of this case.**

vote, recommended the sanction of an "informal admonition." [8]

The Board on Professional Responsibility, with one dissent, imposed the recommended sanction. Like the Hearing Committee, the Board made clear that, in assessing petitioner's conduct, the decisive question was whether a reasonable person could infer that petitioner "may have received" useful confidential information, not whether he had actually done so. Pet. App. 44a. The Board reiterated that, in order to support a disciplinary sanction, there was no need for "proof that an attorney actually had access to or received privileged information in the prior case." Pet. App. 45a; *see also* Pet. App. 58a. In keeping with that view, it further declared that a lawyer charged under Rule 1.11(a) could not defend himself by showing that "no useful information was in fact received during the government representation." Pet. App. 44a. The Board thus upheld, against due process objections,[9] the use of a "conclusive inference" to impose liability based on the possibility that the lawyer might have received information, even though he, in fact, had not. Pet. App. 57a-58a.

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[8] An informal admonition, at one time, was not regarded in the District of Columbia as establishing an ethical violation and was kept confidential. That is no longer the case. Since the District of Columbia determined that only ethical violations should receive sanctions, and that no sanction should be confidential, an informal admonition is now a public sanction for an ethical violation.

We note that petitioner may also be subject to reciprocal punishment in California and New York on the basis of this sanction, without any independent determination by those States. Both California and New York require petitioner to report the results of this proceeding.

[9] Petitioner argued before the Board that use of a conclusive inference to impose punishment impermissibly relieved Bar Counsel of the burden of proving actual misconduct. *See* Opening Br. at 16-18.

The Board also rejected the argument that reformulation of the charges by the Hearing Committee denied petitioner fair notice. *See* Pet. App. 51a; *see also* Opening Br. at 52-59 (making fair notice argument). Although the Board acknowledged that "Bar Counsel's original formulation was not identical to the Hearing Committee's articulation," Pet. App. 51a, it excused the deviation on the ground that "[petitioner] was fully aware of the gravamen of the charges against him." Pet. App. 51a. The Board went on to state that, "[i]n any event, the charge against [petitioner] never changed during the course of the proceedings. . . . At issue always was a single violation of Rule 1.11(a)." Pet. App. 51a-52a.

The court of appeals affirmed. Although it largely relied on the Board report, it, too, made clear that, petitioner's objections notwithstanding, the governing legal standard under Rule 1.11(a)—heretofore applied only in disqualification cases—was satisfied by evidence of appearances, rather than proven misconduct. *See* Pet. App. 5a. *See also* C.A. Br. at 27 (addressing vagueness of Rule 1.11(a)); C.A. Br. at 18, 30 (discussing improper burden shifting). The court explained that "Rule 1.11(a) bars participation in overlapping government and private matters where 'it is reasonable to infer counsel may have received information during the first representation that might be useful to the second. . . .'" Pet. App. 5a. It then stated flatly: "'the actual receipt of . . . information,' and hence disclosure of it, is immaterial." Pet. App. 5a (quoting *Brown*, 486 A.2d at 50).[10]

## REASONS FOR GRANTING THE WRIT

1. This case raises a question of great importance for lawyers and former government officials: whether they may be subjected to punitive sanctions, under a vague

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[10] Four of ten judges subsequently voted to grant rehearing en banc. The motion was denied. Pet. App. 141a.

general standard, for conduct that, at most, creates an appearance of impropriety. Here, the court of appeals held that Rule 1.11(a) of the District of Columbia Rules of Professional Conduct, the so-called "revolving door" rule, authorizes a disciplinary punishment—for undertaking representation in "substantially related" matters—so long as "it is reasonable to infer that counsel *may have received* information during [his prior government service] that might be useful [in a subsequent private matter]." Pet. App. 5a (internal quotation marks omitted) (emphasis added). In so doing, the court of appeals made clear that, under its construction of the rule, appearances, not actual facts, were dispositive, stating unequivocally that " 'the actual receipt of . . . information,' and hence disclosure of it, is immaterial." Pet. App. 5a (quoting *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 50 (D.C. App. 1984) (*en banc*)). *See also Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1188 (D.C. App. 1982) (*Riverfront Parks*) (revolving door rule "is intended to prohibit conduct which would present even the appearance of impropriety"). Thus, even though petitioner had not, in fact, received any information that would be useful to his private client, the court of appeals upheld the sanction imposed upon him.

The use of a broad appearance-based standard to impose discipline is fundamentally inconsistent with established principles of due process. In the first place, a disciplinary rule condemning improper appearances is, by definition, a rule dependent on the eye of the beholder. As such, like any vague law, it is highly unlikely "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the [law]." *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *City of Chicago v. Morales*, 119 S. Ct. 1849, 1859 (1999).

To determine whether the revolving-door rule bars a proposed representation, for example, a lawyer must engage in the almost metaphysical task of asking himself whether some information that he did not receive during his government service—but that a hypothetical observer could infer that he "may have received"—might turn out to be useful in the representation of a private client. A law requiring this sort of guesswork, cabined by little more than the limits of a reasoned imagination, is simply too uncertain a foundation on which to rest punishment of a quasi-criminal nature. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991) (invalidating disciplinary sanction on due process grounds).

A punitive sanction based on hypothetical third-party perceptions also presents an impermissible risk of arbitrary enforcement. As this Court has observed, the most critical concern about vague or imprecise laws is that they fail to "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Rule 1.11(a) presents a classic example. Because its application turns on inferences drawn by a hypothetical person—*i.e.*, whether to surmise that a lawyer "may have received" useful confidential information—it opens the door to what is, by necessity, a highly subjective inquiry. Enforcement officials are thus left free to target persons based as much on their own individual views about the conduct at issue as on any objective evidence of wrongdoing. Indeed, it is a striking fact that petitioner—who received extensive public criticism for agreeing to represent Libya, an obviously unpopular client—is the only lawyer ever disciplined under Rule 1.11(a) or its predecessors.

The past several decades have seen a marked increase in generally-worded laws that, in an effort to promote public confidence, prohibit conduct that might raise even an appearance of improper behavior. *See, e.g.*, 28 U.S.C.

§ 455(a). In their usual application—as grounds for prospective disqualification—these broad prophylactic laws generally have a salutary effect: they provide additional reassurance about the integrity of public and professional activities at a relatively low cost to the affected individuals. But the use of an appearance-based standard to impose punishment after-the-fact is a different matter. No lawyer or government official should be subjected to sanctions on the ground that he "might have received" information that he did not, in fact, receive. That is precisely what happened in this case, and it merits further review by this Court.

2. A second due process problem arises in this case as well. This Court has observed that "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 442 U.S. 100, 106 (1979). Here, however, petitioner was sanctioned, not on the basis of the "specific charges" brought by Bar Counsel, but on the basis of a reformulation of those charges—in particular, a recasting of the government "matters" in which petitioner was said to have been involved—by the Hearing Committee assigned to hear the case. The Board on Professional Responsibility explicitly relied on that reformulation (rather than the original charges) in imposing the sanction, and the court of appeals affirmed on that basis.

This departure from the "specific charges" is not a matter of form over substance. To the contrary, it is the height of unfairness to put a defendant to his defense on a particular set of charges and then, after proceedings have concluded, find him liable on a different charge, involving critical differences in the relevance and weight of evidence. The inequity is all the more pronounced in a case like the present one where the ultimate issues—whether various "matters" are "substantially related" or whether participation was "personal and substantial"—

turn upon a mixture of suppositions and inferences that makes it especially critical to know in advance what matters are at issue. The fact that petitioner was denied that notice is a separate issue warranting the attention of this Court.

**I. A.** State bar associations have long been concerned with promoting public confidence in the conduct of lawyers. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (noting state interest in "preventing the erosion of confidence in the profession.") Much of that effort has historically been focused on assuring that lawyers do not engage in dishonest or unethical behavior, but, in recent years, State Bars have increasingly sought to regulate, not just conduct that is in fact improper, but also conduct that might create an appearance of wrongdoing. *See* Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 Mo. L. Rev. 699 (1998). While the most prominent example of this type of regulation is Canon 9 of the once widely-adopted Model Code of Professional Responsibility—which directly admonished that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety"—more specific rules, less sweeping on their face, also contain broad prophylactic standards to protect the profession against a loss of public support. Despite their good intentions, however, these latter rules, like the broader proscription of Canon 9, can raise serious questions about fair notice and even-handed enforcement.[11]

The District of Columbia "revolving-door" rule raises just such questions. *See* Rule 1.11(a). Although the rule —which bars former government attorneys from undertaking certain private representations—contains no overt appearance-based standard, the District of Columbia

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[11] Canon 9 has been widely criticized on the ground that it is vague and subject to inconsistent enforcement. *See* Flowers, *supra*, at 712-19.

Court of Appeals has held that the rule goes well beyond a prohibition of actual misconduct, declaring that it is "intended to prohibit conduct which would present even the appearance of impropriety." *Riverfront Parks,* 451 A.2d at 1188. The court has thus broadly construed both the predecessor and current rules in order to prevent " 'the appearance if not the actuality of evil.' " *Brown v. District of Columbia Bd. of Zoning Adjustment,* 486 A.2d 37, 44 (D.C. App. 1984) (*en banc*) (quoting *United States v. Standard Oil Co.*, 136 F. Supp. 345, 364 (S.D. N.Y. 1955)). Using far-reaching language once associated with the explicit appearance-of-impropriety standard of Canon 9, *see, e.g., Woods v. Covington County Bank,* 537 F.2d 804, 813 (5th Cir. 1976), the court has emphasized that, rather than targeting some specific impropriety itself, the revolving-door rule is instead "designed to address at least *a reasonable possibility* that some specifically identifiable impropriety would occur." *Brown,* 486 A.2d at 48 (emphasis added) (internal quotation marks omitted). *See also* Pet. App. 62a (preventing the appearance of impropriety is an important consideration underlying Rule 1.11(a)).

To make sure that the revolving-door rule bars even a "reasonable possibility" of misconduct, the court of appeals, in construing its terms, has taken two critical steps. First, in order to determine whether a lawyer has worked on two "substantially related" matters, the court has set a low substantive standard that is specifically grounded in possible, not actual, wrongdoing: that is, whether, taking into account only the rough outlines of each representation, " 'it is reasonable to infer counsel *may have received* information during the first representation that might be useful to the second. . . .' " Pet. App. 5a (quoting *Brown,* 486 A.2d at 50) (emphasis added). Then, to implement that standard, the court has put into place a "conclusive inference" that a lawyer who may have received useful information actually did receive it. *See Brown,* 486 A.2d

at 50; Pet. App. 44a. This conclusive inference assures that a violation of the rule can be found solely on the basis of what might have happened, without proof of what actually did happen. Indeed, as the court made clear, " 'the actual receipt of . . . information,' and hence disclosure of it, is immaterial." Pet. App. 5a (quoting *Brown*, 486 A.2d at 50).[12]

The problem with this loose assemblage of possibilities and inferences is that, while it serves to broaden the scope of the rule, it does so at the price of needed clarity: in the end, it makes the rule intolerably vague. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *United States v. Reese*, 92 U.S. 214, 221 (1876). Thus, contrary to basic principles of due process, it forces lawyers subject to its broad prophylactic restrictions to speculate about "what conduct is prohibited." *Kolender*, 461 U.S. at 357; *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). Because those faced with possible punishment "are entitled to be informed as to what the State commands or forbids," *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), a law must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the [law]." *United States v. Harriss*, 347 U.S. 612, 617 (1954). A punitive law cannot meet that standard unless it establishes an intelligible boundary between innocent and unlawful activities. *See City of Chicago*, 119 S. Ct. at 1859 (plurality opinion); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (law unconstitutionally vague if "men of common intelligence must nec-

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[12] This Court has said that irrebuttable presumptions—which, of course, may dramatically alter the proof necessary to establish a violation of law—are generally disfavored. *See Vlandis v. Kline*, 412 U.S. 441, 446 (1973). In this case, the effect of the presumption is to equate appearances of impropriety and actual impropriety, thereby allowing discipline to be imposed on the basis of the former alone. As we discuss in the text, that is too imprecise a standard to support a punitive sanction.

essarily guess at its meaning") (internal quotation marks omitted).[13]

The line drawn by Rule 1.11(a), however, is all but invisible. To begin with, given its grounding in appearances rather than historical facts, Rule 1.11(a), as construed, provides only the most uncertain indication of "what conduct is prohibited." *Kolender*, 461 U.S. at 357. The speculative nature of the substantive standard, combined with the conclusive inference that possible receipt of information is actual receipt of information, means that a conscientious lawyer, seeking to avoid the handling of substantially-related matters, cannot reliably assess the propriety of a proposed new representation by carefully reviewing the confidential information that he actually received during his government service. Instead, to satisfy Rule 1.11(a), he must engage in an entirely fictional inquiry: whether it is possible that a hypothetical third party—with only the most general awareness about his government activities and no real understanding of his work—could infer that he "may have received" information of possible use in the new representation. Even with the best of intentions, no lawyer can be confident that his answer to this hypothetical question will, in hindsight, be regarded as correct. The very uncertainty of the inquiry "creates a trap for the wary as well as the unwary." *Gentile*, 501 U.S. at 1051.[14]

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[13] A bar disciplinary proceeding is quasi-criminal in nature. *See In re Ruffalo*, 390 U.S. 544, 551 (1968). Although the punishment struck down in *In re Ruffalo* was disbarment, the Court has also applied the due process clause—in particular, applied "void-for-vagueness" principles—to strike down a "private reprimand" imposed by the Nevada State Bar. *See Gentile*, 501 U.S. at 1048-51. That punishment is comparable to the informal admonition imposed on petitioner in this case.

[14] It should be noted that the due process concern about vagueness applies to laws imposing punishment according to a general, appearance-based standard, not to laws that, in order to prevent appearances of impropriety, prohibit particular conduct in specific

The facts of this case well illustrate the nature of this trap. Petitioner testified that, in deciding whether he could ethically undertake even a limited representation of Libya, he considered whether he had obtained any useful confidential information and, after doing so, concluded that he had not. Far from being conclusive, however, this uncontradicted fact turned out to be irrelevant. The Board on Professional Responsibility emphasized that, under the analysis approved in *Brown*, there was no need for "proof that an attorney actually had access to or received privileged information in the prior case." Pet. App. 45a. Later in its opinion, the Board reiterated the point in no uncertain terms, declaring that "the test of the Rule imposes no burden on Bar Counsel to demonstrate what confidential information received in the government representation could be useful in the private representation." Pet. App. 58a. The court of appeals, even while agreeing that " 'no one has ever suggested any improper disclosure of confidences' " (Pet. App. 5a), went on to declare that "actual receipt of . . . information, and hence disclosure of it, is immaterial." Pet. App. 5a (internal quotation marks omitted). But, once *actual* receipt of information is eliminated as the basis of the ethical violation, what is left (the *possibility* of having received information) is simply too haphazard and uncertain a standard to justify a quasi-criminal sanction.[15]

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terms. There is no due process problem, for example, with a law that bars a judge from hearing a case involving a corporation in which he knows that he has a financial interest, even if the interest is insignificant. *See, e.g.*, 28 U.S.C. § 455(b).

[15] Although the Board asserted that "appearances [of impropriety] do not constitute or prove a violation," Pet. App. 62a, that conclusory disclaimer does not square with the standard it applied —a standard that unmistakably and unequivocally provides that the possibility of receiving confidential information and the fact of receiving confidential information are to be regarded as one and the same. Indeed, it seems oddly defensive for the Board to employ a broad prophylactic rule—intended, as the court of appeals ex-

The revolving-door rule also fails to satisfy a second requirement of due process: the obligation to "establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *City of Chicago*, 119 S. Ct. at 1861. More than a century ago, this Court made clear that a legislature may not, by drafting an imprecise, all-inclusive law, "set a net large enough to catch all possible offenders," *Reese*, *supra*, 92 U.S. at 221, and then leave it to prosecutors and judges to sort out those to be punished from those to be left alone. *Id.* To comply with due process standards, therefore, a law must define the prohibited conduct "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. The critical "question is . . . whether [the law] is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051.

The prophylactic standard of Rule 1.11(a) plainly creates a genuine risk of arbitrary enforcement. By its very nature, the hypothetical character of the inquiry permits enforcement officials to put together their own web of inferences about what a lawyer might or might not have known, ultimately basing decisions about the initiation of disciplinary proceedings on their own views about the conduct in question. *See Smith*, 415 U.S. at 575 (noting that vague laws may lead to "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections"). This unchecked discretion raises several troubling problems. Most obviously, it gives Bar officials a license to pursue wholly innocent persons, acting on nothing more than the fact that their activities are

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plicitly said, to prevent even the appearance of impropriety (*Riverfront Parks*, 451 A.2d at 1188)—and then to deny that conduct raising such an appearance can amount to a violation under the rule.

nonconforming or controversial.[16] Furthermore, it brings into play the very real possibility that those officials will choose to invoke their free-floating power against "individuals or groups who may be the object of official displeasure." *Parker v. Levy*, 417 U.S. 733, 775 (1974) (Stewart, J., dissenting).[17]

The risk of arbitrary enforcement certainly cannot be ignored here. To date petitioner is the only attorney ever disciplined under Rule 1.11(a) or its predecessors, even though petitioner not only limited the nature of his representation at the outset, but withdrew from the representation after only two weeks, returning all compensation. This singling-out is all the more striking, given the fact that lawyers have often been *disqualified* under the very same standard, yet none has ever been *disciplined* for that violation. It could be, of course, that the decision to charge petitioner had nothing to do with disapproval of his representing Libya as a client, but the contrary is possible as well: after all, the charges were initiated after sharply critical public reaction to the representation and in the absence of any complaint from the Department of State (the former client) or from anyone else. It is thus entirely possible that, in pursuing this unique prosecution, enforcement officials may have been influ-

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[16] Vague standards give officials an additional power as well: the power to target even guilty persons without being put to the burden of proving actual misconduct on their part. Particularly when combined with the force of a conclusive inference, this power may allow for convictions based on mere suspicion of possible wrongdoing. *See Papachristou*, 405 U.S. at 169.

[17] The American Bar Association Committee on Ethics and Professional Responsibility, discussing the appearance-of-impropriety standard set forth in Canon 9 of the Model Code (*see* page 15 *supra*), pointed to the problems caused by use of that sort of standard to impose sanctions. *See* Formal Op. 342 n.17 (1985). In particular, the Committee expressed the concern that use of the standard would alter the nature of disciplinary proceedings "from the determination of fact issues specified by the rule into a determination on an instinctive, ad hoc, or even ad hominem basis." *Id.*

enced by their own negative views of the undertaking. Whatever may be the case, however, the point is that these questions arise precisely because the vague standard embodied in the revolving-door rule carries with it, at the very least, a "real possibility" of discriminatory enforcement. *See Gentile*, 501 U.S. at 1051.

**B.** This Court, on several occasions, has struck down laws that, like appearance-based ethical rules, make potential liability turn on the subjective perceptions of enforcement authorities or other third parties. Just last Term, for example, the Court invalidated an ordinance that allowed police officers to order dispersal of persons who, in the presence of a suspected gang member, " 'remain[ed] in any one place with no apparent purpose.' " *City of Chicago*, 119 S. Ct. at 1854. In so doing, the Court specifically noted that the standard set forth in the law was "inherently subjective" (*id.* at 1862), because it allowed enforcement to depend, not on whether the defendant actually had a purpose for being in a particular place, but on "whether some purpose is 'apparent' to the officer on the scene." 119 S. Ct. at 1862. *See also Kolender*, 461 U.S. at 353 n. 1 (law prohibiting loitering "without apparent reason or business"). Similarly, in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the Court struck down an ordinance barring " 'conduct . . . annoying to persons passing by,' " 402 U.S. at 612, finding that the law embodied "an unascertainable standard." 402 U.S. at 614. Noting that "[c]onduct that annoys some people does not annoy others," the Court said that "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." 402 U.S. at 614. *See also Papachristou*, 405 U.S. at 169 (observing that "[a] direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster").

The same principles are applicable here. At bottom, it is fundamentally unfair for a State Bar to discipline an attorney based on speculation about what he might have done, rather than on proof of what he actually did. *See In re Ruffalo*, 390 U.S. at 556 (White, J., concurring in result) (disbarment of attorney impermissible "if reasonable attorneys would differ in appraising the propriety of that conduct"). While it is now commonplace to require lawyers and public officials to recuse themselves from matters that might raise even tenuous suspicions about improper behavior, *see, e.g.*, 28 U.S.C. § 455(a), it does not follow—as the "conclusive inference" under Rule 1.11(a) would have it (*see* page 16 *supra*)—that an appearance of misconduct and genuine misconduct are actually the same thing, or that they may be treated as the same thing for all purposes. For example, it would seem highly doubtful that Congress, to promote public confidence in government officials, could make it a criminal offense for those officials to accept benefits that "might appear to be" in connection with an official action. *See generally United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402 (1999). That standard might be enough to support a prospective recusal from particular matters, but it is not a legitimate basis for retroactive imposition of criminal liability.[18]

By the same token, an ethical rule like Rule 1.11(a) provides proper grounds for disqualification of attorneys,

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[18] Although this Court held that an appearance of impropriety justifies vacating a judgment under Rule 60(b), Federal Rules of Civil Procedure, *see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the imposition of punishment stands on different footing. In *Liljeberg*, for example, the remedy simply left the parties in the same position that they had occupied before the conduct raising an appearance of impropriety took place. Here, by contrast, the sanction is a permanent form of punishment, expressing formal disapproval of the conduct at issue.

but not, as a general matter, for their discipline.[19] The same standard ("may have received information") applies in both contexts, of course, but its use for purposes of disqualification is different for several reasons. First, a disqualification proceeding does not put a lawyer at risk of punishment, either criminal or quasi-criminal; at most, he is denied the opportunity to represent a client. Second, and equally important, a disqualification proceeding does not leave a lawyer to imagine for himself what some hypothetical person might infer: a motion to disqualify, prospective in nature, is heard by a neutral judge, who has the authority to decide the applicability of the rule. These factors not only provide for clarity in advance, thus reducing concerns about fair notice, but also lessen the likelihood (and the costs) of arbitrary enforcement.[20]

Although the court of appeals agreed with Bar Counsel that petitioner should have sought added advice before undertaking his representation of Libya, the possibility of getting further guidance does little to solve the vagueness problem. Even leaving aside that petitioner did seek and

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[19] Rule 1.11(a) could, perhaps, be used for disciplinary purposes provided that Bar Counsel specifically pleaded and proved that a lawyer undertook a private representation where he knew, or should have known, that he had previously received useful confidential information during his government service. *See generally United States v. Nofzinger*, 878 F.2d 442 (D.C. Cir.), *cert. denied*, 493 U.S. 1003 (1989) (construing federal revolving-door statute).

[20] An actual impropriety standard for discipline (rather than disqualification) would not impose an insupportable burden on enforcement officials. Many rules and statutes already require proof of specific misconduct. *See, e.g.*, 18 U.S.C. § 207(a)(1) (requiring "knowing[]" violation); § 207(b)(1) (same). Furthermore, in the usual case, Bar Counsel should be able to obtain evidence from officials at the former client, claiming or stating (if that is the case) that the departed lawyer did receive privileged information of potential use in the new representation. What is striking here is that no official—either from the State Department or from any other government agency—has alleged or even suggested that petitioner actually received any confidential information that would have disqualified him from the limited representation of Libya.

obtain a federal license to represent Libya, the fact is that, in the absence of a motion for disqualification, no forum exists in which an attorney may obtain an *authoritative* judgment on the validity of a proposed representation. At best, therefore, attorneys would be remitted to seek out other opinions—possibly right, possibly wrong—about whether the inferences at the heart of Rule 1.11(a) would or would not be drawn. Furthermore, it is not at all clear what weight those opinions, even if available,[21] might carry. No formal mechanism in the ethical rules allows the Legal Ethics Committee, for example, to offer a legally-binding "safe harbor" to lawyers inquiring about proposed representations, so the only safe course for lawyers to follow would be always to decline such representations. Finally, and in any event, the idea of tying the right to undertake a representation to prior consultation with enforcement authorities simply brings the problem full circle: it leaves lawyers faced with a vague law subject to the standardless discretion of officials charged with enforcing it.

The question thus remains: may a State Bar discipline an attorney for what he might have done, but did not, in fact, do? In our view, the answer is that it cannot. While appropriate for purposes of disqualification, that sort of standard is too vague and discretionary, when applied to impose quasi-criminal punishment, to comport with established principles of due process. At all events, however, we think that the question is an important one—particularly in the District of Columbia, where so many former government officials practice law—and it warrants the attention of this Court.

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[21] Although the court of appeals indicated that petitioner should have solicited the views of the State Department, the State Department plainly has no special expertise in applying the District of Columbia Rules of Professional Conduct. It is very doubtful, therefore, that the Department would give an opinion about the applicability of Rule 1.11(a) to a particular case.

**II.** To impose punishment under the revolving-door rule, Bar Counsel must demonstrate that a matter undertaken in private practice is "substantially related" to a matter in which the lawyer had personally and substantially participated as a government official. As just discussed, we believe that the standard used to decide this question is too imprecise to satisfy the dictates of due process. Due process also demands, moreover, that any punishment be assessed only after proof based upon clear and specific charges. *See In re Ruffalo*, 390 U.S. at 550. In the context of Rule 1.11(a), that obligation means, among other things, that prosecuting authorities must define the matter (or matters) said to have been handled during government service with sufficient particularity and consistency to permit a full defense. The failure to do so in this case amounts to a separate departure from due process requirements.

This Court has said that "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn*, 442 U.S. at 106. As a result, "it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." *Garner v. State of Louisiana*, 368 U.S. 157, 164 (1961). Although this principle has been applied most frequently in criminal cases, it is by now well-established that it applies to disciplinary proceedings as well. *See In re Ruffalo*, 390 U.S. at 550. Thus, an attorney faced with a charge of unethical conduct is entitled, as a matter of procedural due process, to "notice of the specific charge, and a chance to be heard in a trial of the issues raised *by that charge* . . . ." *Cole v. State of Arkansas*, 333 U.S. 196, 201 (1948) (emphasis added).

These principles notwithstanding, petitioner was ultimately disciplined on the basis of a "charge that was never

made." *Garner*, 368 U.S. at 164. In his Specification of Charges—the functional equivalent of a criminal indictment or information—Bar Counsel alleged that petitioner had participated in three, and only three, matters of possible relevance to his limited representation of Libya: "the interests of the government of the United States in connection with (a) acts of Libyan terrorism directed against the United States citizens, (b) the [Civil Case] . . . and/or (c) the Criminal Case." The Hearing Committee subsequently dismissed any attempt to rely on the first matter, *see* note 7 *supra*, and Bar Counsel failed to establish personal and substantial participation in the other two. Indeed, at the hearing, and before the Committee, Bar Counsel conceded that petitioner had not participated personally and substantially in the Criminal Case, stating: "I do not contend that Mr. Sofaer was personally and substantially involved in a criminal matter while he was at the State Department" (R. 23, p. 298). With respect to the Civil Case, the Hearing Committee agreed with petitioner that his "participation in the response to the [Pan Am] subpoena"—his most tangible action—was not personal and substantial participation in that case. Pet. App. 125a.

The Hearing Committee, however, did not limit itself to the three matters alleged in the Specification of Charges: rather it recommended a sanction on the basis of a new formulation of the "matter" at issue. Having observed that "Bar Counsel does not delineate in consistent terms the precise formulation of the 'matter' or 'matters' in which [petitioner] participated personally and substantially as a government lawyer," Pet. App. 113a, the Committee undertook, in its Report and Recommendation (issued *after* the hearing), to offer its own definition. According to the Committee, the relevant matter should be characterized as "the establishment of culpability for the 1988 Pan Am 103 bombing, *including* the government's investigation and the ensuing litigation concerning the bombing." Pet. App. 113a (emphasis added). After thus rewriting

the charge, the Committee went on to conclude that petitioner had participated personally and substantially in that redefined matter and, applying the appearance-based standard of Rule 1.11(a), that the matter was substantially related to the limited representation of Libya.

This retroactive broadening of the charges was anything but cosmetic in nature. Most significantly, it changed the focus of the charges from participation *in* the Civil and Criminal Cases—which, for petitioner, was minimal at most—to possible receipt of information *about* those cases, as well as any other possible activity related to the bombing. Thus, although Bar Counsel had already acknowledged that petitioner did not participate substantially in the Criminal Case (and petitioner had no reason to offer further evidence on that point), the Hearing Committee, applying its new formulation, repeatedly relied on the fact that petitioner received State Department briefings concerning the progress of the criminal investigation. Given the speculative nature of the revolving-door inquiry, this was a critical shift: it allowed the Committee to engage in full-blown conjecture, without any opportunity for rebuttal, about what those briefings might have contained. At the same time it gave petitioner no chance to show that his receipt of what were only sporadic generalized briefings about the investigation—briefings that occurred no more than a half-dozen times over a period of 18 months and reflected no reliance on Department of Justice sources—could not possibly support a conclusion of personal and substantial involvement in the "establishment of culpability for the 1988 Pan Am 103 bombing."

To impose punishment on the basis of a rewritten charge is the very antithesis of fair process. As this Court has recognized, disciplinary proceedings are "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. at 551. Those responsible for initiating such proceedings are thus obliged to set out, in reasonably clear and certain terms, the particular basis of the ethical

charge, in order to assure that a lawyer accused of misconduct (like any other person subject to possible punishment) receives "fair notice of the charge." *Id.* at 550. In *In re Ruffalo,* the Court struck down a sanction of disbarment, on due process grounds, because, after disciplinary proceedings had commenced, "the charges [were] amended on the basis of testimony of the accused." 390 U.S. at 551. The situation here, though different in form, is the same in principle: after proceedings had commenced—indeed, after proceedings had *concluded*—the Hearing Committee altered the charges against petitioner so that, in the end, he was disciplined on the basis of "a charge not made." *De Jonge v. State of Oregon*, 299 U.S. 353, 362 (1937).

The Board, while acknowledging that "Bar Counsel's original formulation was not identical to the Hearing Committee's articulation," Pet. App. 51a, nevertheless found no due process problem, stating, *inter alia*, that "[petitioner] was fully aware of the gravamen of the charges against him . . . ." Pet. App. 51a. But this observation totally misses the point. While petitioner undoubtedly knew the "gravamen" of the charges against him in some general sense—*i.e.*, he knew of the allegation that he might have obtained potentially useful information during his government service—the actual charges, set forth in the significantly-named Specification of Charges, were that he might have received information as a result of participation *in three identified "particular" matters.* The case having been limited to those matters, and the defense have been put on notice to respond only with respect to those matters, it was not permissible for the Hearing Committee then to redefine the limits of the government matter at issue, making the overall inquiry add up to more than the sum of its parts. Whether or not the overall "gravamen" of the charges remained the same, petitioner was entitled, as a matter of due process, to have notice of the "specific charges" that made up the

violation of which he was accused, and an opportunity to disprove those charges. The post-hearing reformulation of the charges deprived him of that right.[22]

The Board also declared that, "[i]n any event, the charge against [petitioner] never changed during the course of the proceedings. . . . At issue always was a single violation of Rule 1.11(a)." Pet. App. 51a-52a. But this declaration reflects the same basic misunderstanding: *i.e.*, that it is somehow acceptable, and consistent with principles of due process, to keep the shell of a charge (a violation of Rule 1.11(a)) while changing the particulars of that charge (the matters in which the lawyer is alleged to have participated). The purpose of fair notice is not simply to advise an accused about the legal basis of a charge, or even to inform him, in some general way, about what the prosecution is trying to prove; it is to give him a fair opportunity to defend against the "specific charges" lodged against him. The proper application of that important principle in disciplinary proceedings warrants further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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22 The Board noted that petitioner did not raise his objection before the Hearing Committee. Pet. App. 51a. But the reformulation of the charges occurred in the Report and Recommendation issued by the Committee *after the hearing*. Petitioner then challenged the reformulation in his brief to the Board. That is all the rules required him to do.